

## **ASSESSMENT OF USAID COMMERCIAL LAW AND REGULATORY REFORM ACTIVITIES IN KYRGYZ REPUBLIC**

### **A. Background and Purpose of Assessment**

USAID has been providing assistance in Kyrgyzstan for the development and implementation of Western style commercial laws and for reducing/streamlining business regulatory burdens since 1995. It has had a leading role among donors in several specific areas – including legislative drafting, judicial training, and restraining the “rent-seeking” activities of various national and local government agencies that have authority to regulate private businesses. The current lead USAID contractor for most of these activities in Kyrgyzstan is ARD/Checchi, under a SEGIR LIR task order for Legal Infrastructure for a Market Economy (LIME Project) for Kyrgyzstan and Tajikistan, September 30, 1999, that has a final completion date of August 4, 2005. There has been no external assessment of the LIME Project to date.

The purposes of the current assessment are

- (a) to determine the effectiveness of recent activities carried out under the LIME task order in Kyrgyzstan;
- (b) to recommend possible activities the Mission should consider implementing in Kyrgyzstan following termination of the LIME task order; and
- (c) to indicate commercial-legal or investment-environment components, current or contemplated, as LIME follow-on work, that might be merged into the USAID Trade Facilitation and Investment (TFI) project<sup>1</sup> or a subsequent single, cohesive project.

Size and capabilities of the LIME Project staff. The full-time resident staff of the LIME Project in Bishkek includes two experienced American commercial lawyers who are fluent in Russian, twelve Kyrgyz lawyers, three interpreters, and three other professional staff. Among them, these LIME experts appear to be highly talented and to command great respect among senior officials in the Kyrgyz legislative, judicial, and executive branches; among Kyrgyz legal practitioners; and among the donor agencies.

Perhaps as a result of the ARD/Checchi team members’ abilities and connections, USAID and other donors have often drawn upon the LIME Project team to assist or to deal with matters of legal reform and legislative drafting, law enforcement, and land-market reform that would be beyond the scope of a typical USAID commercial law project in other countries.

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<sup>1</sup> The TFI Project’s component activities for “Reduction of Investment Constraints” in Kyrgyzstan deal with many objectives and counterparts that are similar to the objectives and counterparts served by the LIME Project.

### Summary of recommendations

The assessment team believes that USAID/CAR should continue activities of some part of the ARD/Checchi core team for one or two years in selected areas for

1. drafting and implementation of selected commercial laws, including support for institutional mechanisms that may need to be improved for protection of creditors' rights;
2. cooperation with the Supreme Court, through a new MOU, for (i) training of judges, (ii) continuation of the Judicial Opinion Data Base, and (iii) support of possibly more fundamental reforms, that would need to be taken as high-level, legal or constitutional decisions by the Government, toward substantially greater independence and toward improved ethical performance in the court system; and
3. further transitional support to key institutions that offer promise as self-sustaining agencies such as the Procuracy (to serve as an effective ombudsman in the protection of the business community and property holders against abuse by state administrative bodies) and the International Court of Arbitration.

The assessment team also agreed with the broad recommendation of the current Chief of Party for the LIME Project that USAID has an important ongoing role to play in

... providing direct support to business persons through training and instruction, the production of legal information, support in legislative lobbying and litigation efforts, ... and helping lawyers to become effective partners [through assistance to local business associations].<sup>2</sup>

However, except insofar as these activities might be done as a byproduct of work on the three areas enumerated above, the assessment team would not necessarily recommend that these activities be assigned to a LIME-successor "commercial law project."

Rather, on the basis of initial impressions, it seems that there are other existing USAID-funded projects that might logically assume primary responsibility for those activities – including

- the LARC Project and its local legal assistance centers for supporting litigation actions by small businesses;
- the Enterprise Development or Trade Facilitation and Investment Project for providing resources of technical legal staff or short-term experts, working within one or more local business associations; and
- the Investor Roundtable as a vehicle for lobbying for changes in laws and other government policies.

In designing a successor activity to LIME for 2005-06, USAID/CAR should consider the possibility that USAID could play a leading role in developing a concerted, multi-donor program to help the Kyrgyz government to develop and implement, over several

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<sup>2</sup> Brian Kemple, "Concept Paper for Program Initiatives in Kyrgyzstan to Get Local Business to Use the Law to Protect Its Rights and to Advance Its Interests," October 2004.

future years, a major purge of corruption, cronyism, and political interference from the court system. The scope of such a broad reform of the court system would of course include all of the courts, not just the commercial legal component of the system.

Additional team recommendations about activities that might be included within the scope a follow-on USAID project to LIME/Kyrgyzstan during 2005-06 are included in Section D, pp. 14-25.

Based on its interviews, the assessment team felt that the credibility and effectiveness of key personnel on the incumbent ARD/Checchi team in its work with Supreme Court and other Ministry of Justice counterparts seemed to be quite high and should be a factor in selection of the implementer for a follow-on activity. In particular, this factor could be one reason for continuing a non-competed bridge activity for judicial training and court reform during 2005-06, and for postponing the design of a larger, integrated legal and investment-climate reform project until FY06. Overall, the selection of ARD could be justified on a sole-source basis, owing to the economy and efficiency for the U.S. Government of having the existing contractor implement items 1 through 3, above.

## **B. Assessment Team, Approach and Activities**

For assessment of LIME activities in the Kyrgyz Republic, a team consisting of David Dod (Senior Economist, EGAT/EG), Jan Forest (Senior Trade Advisor, EGAT/EG), and Timur Omoev (Project Management Specialist, CAR/EF) held a series of meetings with private entrepreneurs, legal practitioners, host government officials, and implementers in Almaty (November 2-5, 2004) and Bishkek (November 8-11). CAR Commercial Law Advisor Mark Urban joined the meetings in Almaty; USAID/Bishkek activity managers Irina Krapivina and Eamon Doran joined selected meetings in Bishkek. Principal contacts interviewed are listed in Annex 1. Project managers for the LIME Project, Messrs. Kemple and Greer, and the TFI Project, Messrs. Seibold, Slywka, and Orestis, provided valuable assistance through interviews and introductions to key Kyrgyz contacts.

The team presented an oral report on November 12 in Almaty to the Deputy Mission Director Michael Fritz, Economics and Finance Office Director Mary Norris, Mark Urban, Irina Krapivina, and others.

## **C. Highlights of Recent and Near-term Commercial Law Activities in Kyrgyzstan**

Activities of the LIME Project in Kyrgyzstan fall into four categories that have been described as follows –

1. Legislative reform and drafting
2. Judicial reform and judicial training
3. Building constituencies for a market economy
4. Supporting market reforms

The team did not review the activities of the LIME project experts in the lattermost area of land reform and development of the land market – an area that is under review by a separate USAID assessment team.

## 1. Legislative reform and drafting

Major accomplishments. During 2004 and early 2005, the LIME Project has played or will have played a leading role in the development – through public-private sector working groups – and in drafting of three important pieces of legislation:

- A recent draft Law on Pledge and Mortgage, that will notably incorporate an option for parties to agree on a non-judicial procedure for foreclosure of property in the case of default – in order that creditors might bypass the normally inordinate time and cost now required for seizure and liquidation of collateral through Kyrgyz courts;
- A proposed Law on the Procedure for Conducting Inspections of Businesses (jointly drafted by LIME, TFI, and Investor Roundtable staffs by end-2004) that will clarify that the purpose of inspections is compliance with regulations rather than sanction (or fines); and
- New provisions for the 2003 Law on Normative Acts, to establish a “hierarchy of laws” that will define “core” laws and will give the core laws priority over other (new, narrow, and often badly conceived!) laws and regulations that currently seep through the parliament, the presidential administration, or oblast-level organs without proper scrutiny and rejection.

The first of these three laws is very significant. Around the world, the introduction of non-judicial foreclosure for mortgaged real estate typically has a major, positive impact upon the amounts of loans to business (as more types of property, especially residential units, become usable as collateral; as longer loan maturities become available; as maximum loan-to-value ratios<sup>3</sup> of property increase) and upon reduction in interest costs of such secured loans. Adoption of non-judicial foreclosure in Kyrgyzstan – which will clearly be a win-win law for both borrowers and lenders – should have been completed in 2004 but it has been delayed. A mischievous maneuver by the chairman of a Parliamentary committee during the summer of 2004 amended the LIME draft law so as to permit non-judicial foreclosures only in the case of loans extended at below-market interest rates – which would render the application impossible for normal commercial mortgages! After this mischief was detected, foreign donors raised the problem to the attention of the Government and requested, and obtained in August, a Presidential veto of the legislation and proposal for deletion of the offending restriction on permissible rates of interest. Because the Parliament did not respond to the alternate language

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<sup>3</sup> Note: the current, maximum loan-to-value ratio for mortgage loans in Kyrgyzstan was reported by two sources to be 50 percent.

requested by the President, the proper, original legislation must now be resubmitted in 2005.

The Law on the Procedure for Conducting Inspections of Businesses (with a target for parliamentary approval by July 2005) is expected by one ARD/Checchi legal expert to have a powerful potential for reducing solicitation of bribes by officials in regulatory agencies. The reasoning goes that: if business managers know that they will have an opportunity to correct a violation discovered during an inspection, there will be less need for them to offer an on-the-spot bribe in order to “fix” the problem. On the other hand, there could be little or no anti-corruption impact if the cost of remedying the violation prior to the subsequent re-inspection exceeds the bribe that the inspector will accept.

In preparation of a new “Hierarchy of Laws” in early 2005, LIME is expected to lead the development and drafting of those provisions, within the public-private Working Commission on Deregulating the Economy and with representatives from the parliament and the judicial system. That work is planned for completion in the spring of 2005. The purpose of the “Hierarchy of Laws” would be to give the Supreme Court more authority to invalidate bad but newly passed laws – such as a July 2004 law on the environment and tourism in the Issy-kuhl region that is inconsistent with other laws regarding property rights and is inconsistent with Kyrgyzstan’s treaty obligations under WTO agreements.

Other accomplishments. During 2004 and for early 2005, the LIME Project also seems to be playing an important supporting role (as indicated in the Investment Matrix for 2004-05 -- see Attachment 2) in several other areas of legislative drafting and lobbying, including

- Four other areas of change to the Law on Normative Acts, including requirements (that were drafted by the TFI project staff) for regulatory impact analysis for all new regulations on business – an area of common “rent-seeking” abuse by national and oblast-level agencies;
- Organizing and representing business interests to object to (and to obtain partial removal during 2004 of) provisions of the draft Tax Code that seemed to increase business enterprises’ vulnerability to excessively intrusive tax inspections;
- Amendments to the Land Code to improve zoning practices (amendments drafted by the Chemonics project);
- Amendments to the Code of Administrative Responsibility to allow heads of oblast justice departments to impose administrative sanctions on officials for violations of the Administrative Responsibility Code;
- Collaboration with the TFI project to research and to redress the problem of unnecessary, expensive but frequent surveys of property by GosRegister anytime a lien or status change (e.g., conversion to rental) of a piece of real estate might occur.

## **2. Judicial reform and judicial training**

The LIME Project seems to have led a major “revival” of USAID’s ability to influence positively the future performance of Kyrgyz courts in several ways, by helping to orchestrate in March 2004 a USAID MOU with the newly appointed head of the Supreme Court, Justice Osmonov. The three key elements of the MOU (at Annex 3) are

- Expansion of scope and resumed updating for the public, online Judicial Opinion Data Base;
- Resumption of USAID training of judges and USAID supply of training materials to the Judicial Training Center;
- An opportunity for USAID to request “clarification” of certain laws and their interpretation by the Supreme Court (hopefully to guide practice at lower courts).

In addition, USAID agreed to provide an additional 35 computers, to be allocated to many of the 70 central, oblast, or district-level courts in Kyrgyzstan – to supplement computers that USAID had provided to most of the then-separate Arbitrazh (i.e., specialized commercial law) court judges, prior to 2003.

The operation of the Judicial Opinion Data Base (JODB) requires substantial joint effort from both the Court System and USAID. The courts at each level are directed to supply the judge’s written opinions since mid-2002 on commercial law cases, civil law cases, administrative law cases and criminal law cases<sup>4</sup>; USAID’s LIME Project staff then collects each opinion (as an electronic submission or as hard copy to be scanned) and posts it on the online JODB website that is maintained by the LIME Project.

The JODB was initiated in 2000, covering 10 “commercial courts” that were then under the direction of Mr. Aybek Davletov, was developed for judicial training purposes, and was limited to include only commercial law cases. New entries to the JODB lapsed in 2002, when Mrs. N. N. Beishenaliyeva, Chairman of the Supreme Court between early 2002 and February 2004, began to merge the commercial, civil, and criminal courts into a single, combined structure of 70 courts. Cooperation on the JODB from Supreme Court Chairman Osmonov and the courts with USAID then resumed in the spring of 2004; and a great surge of recent or new cases since then has been transmitted and posted on the JODB website. As of November, a total of 15,000 Russian-language opinions (and 3,000 in Kyrgyz language) had been posted – most of which had been received during the previous five months.

The impact and significance of the JODB to date is not entirely clear. One distinguished lawyer and businessman, Mr. Temirbek Kenenbaev, who chairs the International Court of Arbitration in Central Asia and whose private law firm represents many large foreign investors, stated that the JODB is very useful and that “judges often refer to it in their work.”

In his comments to the assessment team, the Supreme Court’s First Deputy Chairman Aybek Davletov felt that the main users of the JODB are businessmen and government

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<sup>4</sup> By agreement, however, the JODB is not to include cases reviewed as a matter of special proceedings; criminal cases involving military personnel, family relations, minors, or sexual offenses; and cases involving State secrets.

administrative agencies. Davletov said that, as one illustrative result of the wide use of the JODB, government tax administrators now make “fewer mistakes” in assessing tax penalties. He felt that the broad benefit of the JODB was “to make the system transparent.” However, Davletov felt that most judges do not regularly consult the data base regarding similar cases that they are currently handling – in part because of the limited availability of computers within the courts.

USAID training of judges. After active USAID involvement in systematic training of Kyrgyz commercial law judges in the late 1990s, two interruptions have occurred since 2000. Following incidents in which Kyrgyz courts had been complicit in supporting criminal cases against potential opponents of the President in order to remove them from the political arena, the U.S. Ambassador instructed USAID to halt all work with the courts from the end of 2000 until early 2002. A judicial training program then resumed for about one year but was then suspended, during a period of turmoil and reorganization of Kyrgyz courts (merging commercial and criminal courts), from February 2003 until March 2004. At that time, as agreed in the MOU of March 2004 between USAID and Supreme Court Chairman Osmonov, the USAID commercial law program resumed and began to develop a broad training program for judges in the Kyrgyz courts.

After resumption of the training program, the LIME project has held a number of short seminars – one on tax law; two regional seminars, requested by the Court System, on the new Civil Procedure Code; and a train-the-trainers seminar for judges who will serve as many of the lecturers in the planned mass training program that has now been designed for January-July 2005. The project also plans to hold a third seminar on the Civil Procedure Code, and perhaps a seminar for support personnel on topics such as preparing reports; case management; and keeping records of court proceedings.

The major training activity that has been developed per the MOU will be a series of two-week courses at the Judicial Training Center, or in the regions, that will be repeated for at least seven groups of 20-25 judges each – involving altogether about half of the sitting judges in Kyrgyzstan. That program for January-July 2005 contemplates holding one two-week seminar (10 training days) per month. Judges will be grouped by area of specialty for the training – i.e., commercial; civil; and criminal law – the departments represented at each court.

Each of the two-week seminars will consist of three parts: (1) a section on general judicial topics that will be the same for all judges, e.g., constitutional law; judicial ethics; the role of international law and agreements in the local legal system; (2) a section devoted to current practice issues in the group’s particular area; and (3) a section on other subjects, such as legal reasoning, writing opinions, communications and psychology. Topics that will be covered in the seminars, as agreed between the Project and the Court, are shown in Attachment 3.

### **3. Building constituencies for a market economy**

The goal of the project in this area has been to make the laws and regulations more transparent and to teach citizens how to use law to promote their own interests. There have been a number of what could have been major accomplishments by ARD/Checchi in this area. Unfortunately, many of the previous efforts have already been rendered ineffective through later actions of the Kyrgyz Government in overturning laws and the fact that a new constitution was written.

Legal publications and services to the business community. The project has made numerous efforts to make the laws of Kyrgyzstan more transparent and better understood by private legal practitioners, entrepreneurs, and the general public. Selected recent publications on the project's website and, in some cases, distributed as printed materials are indicated below.

A number of other published items, such as the LIME Project's Civil Code Commentaries, Part II (completed in 2002) and Part I (completed in 2004), will shortly require updating when amendments to the Codes are adopted by Parliament in early 2005. Those Commentaries were not official interpretations of the Code, but the understanding of legal practitioners working in the area. They were intended to cover the entirety of Parts I and II of the Civil Code. In anticipation of the amendments now before Parliament, the ARD/Checchi team have updated the commentaries but are waiting for their official adoption before releasing the updated version.

The assessment team did not query Kyrgyz business and legal practitioners about their familiarity and use of the following materials or about the impact that they may have had upon the ability of businesses to operate more effectively. It would be important to collect evidence about the usefulness of those materials and to weigh such impact effects before deciding whether to provide further USAID assistance toward the future production of such published material.

a. Electronic Litigation Guide

This four-volume database was completed during the first half of 2004 and provides the user with all documents needed to file motions and pleadings in criminal, civil, commercial law and administrative law proceedings. It also contains commentary and links to laws and regulations. However, recent changes to the Civil Procedures Code (September 2004) and Criminal Procedures Code now limit the usefulness of this previous edition, and the author has not been available to update this work. The project is planning a fifth volume to the database, covering constitutional court practice.

b. Electronic Guide to Notary Transactions

This guide contains the legal forms needed by the notary in everyday practice. However, it may also need revision due to recently adopted changes to the Civil Procedures Code and changes to the Civil Code.



c. Tax Publications and Services

In the tax area, important products produced by the LIME project have included commentaries on the Tax Code, a tax guide for business, and a journal entitled "Tax and Law."

Over time the management and publication of these products has been turned over to the Chamber of Tax Consultants -- which was founded seven years ago, received extensive assistance from USAID projects in its initial stages, and now appears to be a financially self-sustaining organization. Member tax practitioners in the Chamber pay quarterly dues. The professional journal "Tax and Law" -- sold by subscription but also receiving some financial support of the project -- is published by the Chamber. The journal now has about 800 subscribers.

More recently, the Chamber of Tax Consultants established a public hot line that allows citizens to receive free answers to tax questions by email. The Chamber has now set up a new Association of Taxpayers, with a \$50 membership fee, to represent common interests of business and to lobby the government for policy changes.

d. Public Information Brochures

These brochures provide basic information on legal issues encountered in everyday life. Topics covered include tax, consumer protection and planning and registering a business.

e. Other Journals

The journal "Law and Business" addresses current commercial law and business issues in Kyrgyzstan. The purpose is to try to change the attitudes that hold that law is useless and irrelevant to the needs of business and citizens in general. It is published bimonthly

f. Subscriptions to Commercial Databases

The project provides libraries, legal centers and the court and procuracy with subscriptions to Toktom and Advisor (commercial legislative databases).

Training for businesspersons in legal and regulatory remedies. During 2004 the LIME project has given increased emphasis to more intensive training of businesspersons and business advocates to become knowledgeable about the law and to use this knowledge to begin to lobby the government for remedies of regulatory actions that are improperly implemented and unfriendly toward business. The project provided four roundtables for businessmen in early 2003. The purpose was to work with businesspersons in determining what kind of training they needed.

During December 2003 through May 2004, the LIME staff developed and presented a more intensive program of practical training on business law and their rights to a group

of fifteen business people. Seminars were generally 2-1/2 hours per day, three days per week, over that extended period. As an outgrowth of the seminars, participants founded a Business Club and helped the LIME project to organize roundtables in July and August to collect input from small businesses on their experience with illegal inspections. This information was then used within the expert group that was drafting the proposed Law on the Procedure for Conducting Inspections of Businesses – to reduce the flexibility of inspection agencies and to expand the named agencies that are to be covered by the law.

On a practical level, two of the businessmen trained through the project have begun providing advice to other businessmen during inspections by State agencies. They have assisted approximately 20 to 30 businesses per month. They have been able to advise clients on their rights and to help keep inspections within current legal parameters. Meanwhile, the Business Club has expanded to a group of about 200 “members and friends,” according to its president, Ms. Irina Goshkova, and has collected about \$6,000 in ad hoc contributions. The club circulates a newsletter, and its members have collaborated on one commercial project (involving development of a shopping center). However, it is still early to judge the sustainability of the Club as a new business association – since it has no fixed membership fee, no permanent staff, and depends upon the LIME project for consultants to help develop its planned future agenda for lobbying the government.

In general, the formation of strong and viable indigenous business associations in Kyrgyzstan has been difficult. According to one of the businessmen interviewed, the high-profile Congress of Business Associations apparently has no staff and recently had to give up its office for financial reasons.

#### **4. Supporting market reforms**

The goal of the project in this area has been to further selected activities of other donors and institutions that are attempting to foster market reform in Kyrgyzstan. These have included the USAID LARC and land reform projects, the efforts of the International Court of Arbitration (ICA) to develop alternative dispute mechanisms, the Asian Development Bank’s program to refurbish irrigation systems, and efforts by the USG to combat crime. In this assessment, we reviewed only the ICA reform efforts and the efforts to combat crime.

##### **a. International Court of Arbitration (ICA)**

After many years of USAID effort, significant progress has been made during the past year to develop an out-of-court system for arbitration. The Civil Code was amended to provide for third-party arbitration, based on UNCITRAL rules, in 2002; and a financially independent Bishkek affiliate of the ICA was established in 2003. The Bishkek ICA now has an accepted roster of approximately 125 arbitrators from 23 countries (fifty percent of whom are from Kyrgyzstan). It is the only affiliate of the ICA

in Central Asia, and Kyrgyzstan is the only country in the CAR region that has a constitution and law that allows third-party arbitration. Fees are collected only in the event that a dispute is actually decided by arbitration, and the fee is low (no more than five percent of the amount in dispute). Half of the fee goes to the ICA for operating expenses; the other half is paid to the arbitrator.

To build interest in the business community, ICA and the LIME project conducted workshops on the use of ICA arbitration clauses during early 2004 for 60 business representatives. A survey conducted after the workshops indicated that many were including such clauses in new commercial contracts. The department store Tzum reported that it had included ICA arbitration clauses in 500 contracts. The Credit Investment Bank now includes a requirement for ICA arbitration as a standard clause in all of its loan agreements. Some Kazakh businesses are also now including arbitration clauses in their contracts that are subject to resolution by the Bishkek ICA.

As of November 12, 2004, the ICA had heard four arbitration cases. One large case led to court action, when the losing party attempted to block enforcement of the \$1.2 million judgement. The local and oblast-level court supported the losing party, but the Supreme Court reversed that action and allowed the enforcement to proceed. [More details may be useful to add here. Is the Supreme Court ruling likely to deter future attempts to reverse third-party arbitrators' decisions? Or are there likely to be many additional and sometimes successful challenges?] Irina: I think there is no correct answer to this question at this stage. There are reasonable grounds to believe that, with proper support from the Supreme Court and with some training of judges, courts will uphold third-party arbitrators' decisions. However, the culture of state courts supporting someone else's decisions is not yet in place and there will definitely be some growing pains. I need to review the Supreme Court ruling before I may actually answer this question. I will try to respond no later than January 6.

To support the launch of the Bishkek ICA, USAID agreed two years ago to cover the full office expenses during the startup year of 2003, to cover two-thirds of the office expenses during 2004, and to cover one-third of such expenses in 2005. Owing to delayed startup, initial revenue of ICA has fallen below projection – with the four cases resolved during the first ten months of 2004 yielding only \$13,000 in fees, of which half was paid to the arbitrators. Two additional cases were expected to be decided in November. ICA Chairman Kenenbaev estimates that ICA Bishkek will only become fully self-sustaining when the number of disputes handled reaches about 50 to 100 per year.

#### b. Role of the Procuracy in Combating Regulatory Abuses

ARD/Checchi's initial work with the Procuracy was through an \$80,000 "buy-in" from State/INL – under which the LIME project provided an "automation system to address economic crimes." The purpose of this software for case-management and tracking investigations was to increase the capacity to collect and manage information concerning trafficking of women and other economic crimes. The scope of that

automation system has since been widened to cover everything that the Procuracy does in criminal, civil or commercial law.

ARD/Checchi's relationship with the Procuracy has led to new areas of collaboration to stop abuses by regulatory agencies that were identified by LIME or TFI and to promote improved business environment

- (1) to protest in 2003 the Mayor of Osh order to raise a quota amount of revenue from fines and inspections, 160,000 som, to be contributed to the municipal budget (successfully reversed);
- (2) to protest Gosregister's regulation requiring a two-step process for registration of buildings and, separately, to certify ownership of the land under the building (regulation nullified, November 2003, but no replacement regulation introduced; Gosregister continues to practice as if the regulation had not been nullified); and
- (3) to research and to redress the problem of unnecessary, expensive but frequent surveys of property by GosRegister anytime a lien or status change (e.g., conversion to rental) of a piece of real estate might occur (not successfully completed yet).

The procuracy now has a 24-hour hotline to receive complaints from business and other citizens. Prosecutors' working groups have been developed with business and donor projects in Osh and Bishkek (national). New working groups are also under development in Issy-kuhl, Bishkek (local), and Talas. To assist the working groups, the LIME project has been working to identify inconsistent laws or local regulations, to take action against government officials responsible for illegal acts, and to develop relationships with local media to inform businesses of their rights.

#### **D. New or Continued Commercial Law Activities Needed After August 2005**

**Is the environment conducive to reform?** One general point considered by the assessment team is whether the government and other key counterparts in Kyrgyzstan remain broadly committed to improving the commercial legal and regulatory environment or whether their receptivity to reform has weakened and their commitment to action may be too weak in critical areas affecting the business climate. During 1991-96, Kyrgyzstan was widely considered the most progressive of all of the ex-Soviet states in its embrace of market-economy principles and its adoption of Western laws and institutional standards. However, for the period 1996-2002, evidence from surveys and indicators analyzed by the World Bank, the EBRD/World Bank BEEPS report, and others seemed to show no improvement in Kyrgyz performance in the areas of government effectiveness, the rule of law, and control of corruption – although some improvement in “regulatory quality” during that period was noted.<sup>5</sup>

Business regulatory environment. Three of the Kyrgyz business and legal practitioners interviewed in Bishkek expressed a view that the business and investment climate in the

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<sup>5</sup> See sources cited in the World Bank, Country Economic Memorandum: An Integrated Strategy for Growth and Trade, June 24, 2004, pp. 83-85.

country has improved since 2001 or 2002. One of them gave particular credit for that improvement to the creation in 2001, at request of the Asian Development Bank, of a Consultative Commission on improving the investment climate that included private business members. Another cited the particular influence of Mr. Djoomart Otorbaev, now Deputy Prime Minister, whose team had drawn attention to recent, positive examples for improving the business climate from Russia and other progressive, former Soviet countries. Otorbaev created a broadened platform for private participation in several public-private working commissions, whose respective reform goals are now enshrined in a national Investment Matrix that is periodically presented and endorsed by the President as an “official” reform agenda. (See the most recent Investment Matrix for September 2004-August 2005 at Annex 2).

One expatriate who was interviewed in Bishkek, Mr. David Grant, Director of the International Business Council, expressed a contrary opinion that the business environment had NOT improved during the three years that he has been in Kyrgyzstan.

Judicial reform environment. Resident expatriates in both the legal and business professions expressed strong opinions that the courts in Kyrgyzstan are highly susceptible to corrupt practices. Judges often demand that bribes be paid, in return for a timely and desired decision on a commercial dispute. Objective evidence collected through the “Doing Business” surveys for 2004 sponsored by the World Bank (see Annex 5 or

<http://rru.worldbank.org/DoingBusiness/ExploreEconomies/BusinessClimateSnapshot.aspx?economyid=106> ) also indicates that enforcement of a valid contract through the courts in Kyrgyzstan is inefficient (requiring an average of 46 procedures, at a cost of 48 percent of a typical-sized debt) compared to the averages for other countries in the region of Europe and Central Asia (29 procedures, at a cost of 18 percent of the debt).

Does the Kyrgyz Government have the political will to fix the judicial environment? Is it worthwhile for USAID to make efforts to create or strengthen such political will? The assessment team is not able to answer these questions. However, these are important questions for USAID/CAR to review after further assessment of recent debates within the government on reform of the judicial system, evaluation of the Law on the Supreme Court of 2004, and further discussions with Chairman Osmonov.

## **1. Legislative reform and drafting**

Legislative watchdog responsibility. The involvement of the LIME Project in the detection of the unexpected defect and in the veto of the Law on Pledge and Mortgage, cited on page 3 above, raises an important point for further review and assessment by USAID. Is this a type of ‘watchdog role’ on proposed or pending laws, wherein the LIME Project has had a critical role in identifying and in organizing remedial action? Does USAID need to continue supporting this function after August 2005 and, if so, through what mechanism?

In a well-functioning government, new legislation that would conflict with other, existing laws or that may contain other serious flaws would be flagged for attention by the legal department of the parliament, before passage, or by the legal department of the Presidential Administration, before signature. Mr. Kenenbaev, who had been the deputy head of the legal department of the Kyrgyz Presidential Administration until leaving the public sector in 1995, and others who were interviewed in Bishkek expressed a shared opinion that these “internal” legislative review mechanisms in the Kyrgyz Government have performed very poorly, particularly during the past four of five years. The low salary level (\$150-200 per month) is one factor that makes it very difficult for these departments to retain legal advisors who, in the private sector, can earn four to five times as much.

Because of the weak internal vetting of legislation, there will be an ongoing need in Kyrgyzstan for “external” legislative review that donors and/or the business community can provide – in order to ward off, or to correct, important impediments to business that continue to crop up in new legislation that is being initiated or amended in the parliament. In principle, other donors and the staffs of other “business climate-improvement” projects (such as the USAID-assisted Investor Roundtable or the TFI project) could help play such a watchdog role if the ARD/Checchi project presence disappears. In addition, there may be merit in moving some USAID provision of legislative-watchdog talent inside a new business association (such as suggested in section B.4, below.)

Mr. Kenenbaev volunteered the opinion that, after observing donor-funded legal-reform projects in Kyrgyzstan over the past 13 years, he would strongly commend the ARD/Checchi team as the most effective “legislative watchdog” and as the best leader in coordinating remedies after defective legislation has been adopted. In contrast, Kenenbaev said that the legal and regulatory reform work sponsored by non-U.S. donors had been very ineffective – often a total waste of money. He did not seem to be familiar with, nor was he able to comment on, specific recent legislative drafting and regulatory-reform work that had been done by USAID’s Pragma TFI team.

Drafting and implementation of future laws. The assessment team did not attempt a systematic review of commercial laws and the quality of their implementation. Our primary attention was focused on areas of “current priority” that were identified in Section C.1, above, and that correspond to major goals in the most recent Investment Matrix for September 2004 through August 2005. However, some *ex post* “desk study” by the assessment team suggests a few areas that warrant further investigation as possible added priorities to be addressed by LIME successor project toward

- correction of existing laws or
- improving the implementation of commercial laws and regulations.

The World Bank and other donors in Kyrgyzstan consistently complain that ‘good laws’ may be adopted but are then implemented poorly or not at all. Therefore any further new work that a follow-on USAID commercial law project might undertake in the following three areas (items i through iii, below) should pay particular attention to the

need for remedy of problems in administration or implementation – rather than just the need for redrafting of the law.

(i) Improved implementation of the pledge system? Assuming that the USAID-supported Law on Pledge and Mortgage, with effective provisions for non-judicial foreclosure, will be enacted in 2005, the benefits of wider availability and lower costs for bank credit may not be realized unless reliable, efficient systems are in place for recording and searching liens by other creditors. In connection with the pledge system for “moveable property,” the recent World Bank Country Economic Memorandum notes that the registry system

‘does not appear to be functioning properly. The registry system is paper based, and the centralized computer system provided for in the law has not been established. Currently there is no sign that such a system is being established.’<sup>6</sup>

If no other donor has been identified yet to help rehabilitate the registry system, this is a critical role that USAID could help to fill drawing on best practices from other countries in the region – possibly the registry system that is now operating in Romania.<sup>7</sup> It would seem logical for the LIME project to undertake that task, since the EBRD, World Bank, and the LIME project apparently were the donors that developed the related, amended pledge law that is now planned for enactment in 2005.

(ii) Contract enforcement? As indicated on page 13, above, contract enforcement through the courts in Kyrgyzstan is difficult -- “amongst the 10 most costly countries in the world in dispute resolution” according to the World Bank – and signals the need for judicial reform in that area. (Meanwhile, of course, the poor performance of the courts in this area is already contributing to rapid adoption of third-party arbitration and should support buoyant growth of the fledgling International Court of Arbitration that USAID has been assisting in Bishkek.)

USAID/CAR might consider using its influence through its Kyrgyz Judicial Training Program and its MOU with the Supreme Court to help transplant or replicate “best practices” from countries in the region that do a better job of dispute resolution. As indicated by the World Bank’s “Doing Business” website (cf. Annex 5 for Kyrgyzstan), the countries in the E&E region that have the most rapid process and lowest cost for enforcing commercial contracts are the Baltic Countries and Armenia.

(iii) Improvement of bankruptcy procedures? An assessment by the World Bank staff during 2004 comments that Kyrgyzstan’s

‘recently amended Bankruptcy Law [2002] achieves some of the goals of insolvency, but it does not do well in terms of time (bankruptcy takes about four years to complete) and seldom results in an economically efficient outcome (in

<sup>6</sup> World Bank, Country Economic Memorandum, June 2004, p. 95.

<sup>7</sup> See Rodrigo Chaves, Nuria de la Pena, and Heywood Fleisig, “Secured Transactions Reform: Early Results for Romania,” September 2004.

terms of a foreclosure and liquidation), or in successful rehabilitation (maintaining the business by hiring new management).<sup>8</sup>

It does not appear that previous USAID commercial law work in Kyrgyzstan has dealt with the bankruptcy law and process. However, USAID has had substantial programmatic experience in improving the functioning of bankruptcy processes in other Russian-speaking countries (for example, through a large DTT bankruptcy project in Ukraine that trained many Ukrainian judges and specialized bankruptcy practitioners). Thus, even if USAID did not directly fund future work to improve bankruptcy processes in Kyrgyzstan, the Mission could help the MOJ and another donor to identify useful tools, training materials, and personnel that could be borrowed from USAID activities in such other countries.

For the E&E region, the World Bank's "Doing Business" website shows that Latvia and Russia seem to be achieving notably prompt and low-cost resolution of bankruptcy cases, with a high rate of recovery by creditors – and may offer good models for Kyrgyzstan to emulate.

## **2. Judicial reform and judicial training**

After the LIME task order ends in August 2005, there are strong reasons for USAID to negotiate an extension of its current MOU with the head of the Supreme Court and to continue an active USAID role in three specific areas:

- Technical and financial support to maintain and expand the Judicial Opinion Data Base;
- An additional round of training for judges, October 2005-July 2006, based upon a fresh survey of judges and entrepreneurs re most important weaknesses in the system; and
- Requests for clarification of judicial standards and procedures from the Supreme Court in important areas of commercial dispute where either misconduct/misapplication of law by judges or adverse practical effects of court decisions have been observed.

In addition, there may be a need for provision of further computers for the use of judges, such as the 35 procured in connection with the MOU for 2004. However, USAID project managers should investigate the need, availability of such equipment from other donors, and the relationship to a possible broader "judicial reform agenda" before making a conclusion about the possible role of USAID in supplying additional computers.

A broader judicial reform agenda? One representative for the business community, David Grant, Director of IBC, commented that the courts in Kyrgyzstan are badly

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<sup>8</sup> Kyrgyz Republic Consultative Group Meeting, Background Paper on NPRS Implementation and Key Issues Going Forward, October 15, 2004. Page 6.



corrupted – which creates major problems for the business environment. Grant presented to the assessment team a written proposal for a bolder set of reforms of the judicial system that might include

- Greater financial independence of the courts from the President and the Ministry of Finance,
- Greater political independence from the President and Government,
- New recruitment criteria, steady judicial training, and disciplines for professional misconduct by judges, and
- A program to reduce the numbers and to raise the pay (a five-fold increase was suggested) of judges.

Some further investigation should be done by USAID on the merits of these proposals, and their political feasibility should be assessed.

Similarly, the USAID activity manager in Bishkek for the LIME project, Irina Krapivina, noted that in 2003 ABA/CEELI had ranked Kyrgyzstan as “positive” only on two out of total of thirty factors used by ABA/CEELI in its Judicial Reform Index (JRI) for assessing judicial reforms in Europe and Eurasia. Kyrgyzstan was assessed as “negative” on all factors in such categories as financial resources, structural safeguards, and accountability and transparency, including:

Factor 7 Judicial Jurisdiction over Civil Liberties	Negative
Factor 8 System of Appellate Review	Negative
Factor 10 Budgetary Input	Negative
Factor 11 Adequacy of Judicial Salaries	Negative
Factor 12 Judicial Buildings	Negative
Factor 13 Judicial Security	Negative
Factor 14 Guaranteed Tenure	Negative
Factor 15 Objective Judicial Advancement Criteria	Negative
Factor 16 Judicial Immunity for Official Actions	Negative
Factor 17 Removal and Discipline of Judges	Negative
Factor 18 Case Assignment	Negative
Factor 19 Judicial Associations	Negative
Factor 20 Judicial Decisions and Improper Influence	Negative
Factor 21 Code of Ethics	Negative
Factor 22 Judicial Conduct Complaint Process	Negative
Factor 23 Public and Media Access to Proceedings	Negative
Factor 24 Publication of Judicial Decision	Negative
Factor 25 Maintenance of Trial Records	Negative
Factor 29 Computers and Office Equipment	Negative

In the opinion of USAID/CAR staff, the judiciary has very little opportunity to influence the amount of money allocated to it. While this amount has increased each year, it remains insufficient to improve the delivery of justice, and it is limited to fundamentals such as salaries and basic building repairs. The budget is administered by the Department of Courts, which is under the Ministry of Justice, and judges have little

influence over how funds are ultimately spent. Salaries of judges are considered insufficient to support families and live in a reasonably secure environment,

Judges are re-appointed and advanced based on an informal, non-transparent attestation process. There are also no transparent processes, governed by objective criteria, currently in place for the punishment of judges for misconduct. The President has the power to remove judges for broad and ill-defined reasons. Although the President has only used this power infrequently, USAID and LIME project managers feel that it has produced a chilling effect on the independence of judges. Cases are assigned by the chairs of the individual courts and not by any objective or randomized method.

To correct the above systemic problems of the courts that USAID/CAR staff, LIME project staff, ABA/CEELI, and IBC have identified, political will would be required at the highest levels of KG government and may be lacking. As a means to help build greater political will, it may be useful for USAID during 2005-06 to indicate and to document for the Government the experience of other FSU countries (Armenia? Moldova? Ukraine?) that seem to have been able to make a major improvements in these areas.

If a receptive dialogue with the Supreme Court and the Government can be established in these areas, the implementation of such fundamental reforms of the judicial system could be tied to future technical assistance and conditional lending programs of the World Bank and other donors. In principle, such a program could be attached to the third and final tranche of the Bank's current Governance Structural Adjustment Credit (GSAC) that was agreed in April 2003 and will extend through perhaps mid-2006. In November, the Chairman of the donor Consultative Group in Bishkek listed "judiciary reform" as the fourth of six "future priority areas in the area of good governance and corruption." On behalf of the donors, he noted in that area the need for "allowing genuine independence of the judiciary, including financial independence; the introduction of new recruitment criteria and clear professional contractual standards, along with disciplinary procedures; further support to legal and court institutions to diminish state seizure, corruption and lack of faith."<sup>9</sup> However, judicial reform was not an important theme of the GSAC agreement in 2003, and it seems unlikely that the Bank and the Government would revise the release conditions for tranches two and three of the credit in order to include new conditions related to judicial reform. It would be more realistic to consider that reform of the Kyrgyz court system could become a major theme for a new "adjustment credit" that might follow in 2006, after completion of the GSAC program.

Meanwhile, Justice Davletov noted in his November meeting with the assessment team that the courts have made some small gains recently in achieving greater independence. Toward budgetary independence, he stated that per the Law on the Supreme Court (July 2004) the level of annual funding for the courts is locked in (cannot be reduced by the President), once that line item has been approved as a part of the annual Budget. To

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<sup>9</sup> Chairman's Report of Proceedings, Consultative Group Meeting for the Kyrgyz Republic, November 3, 2004, page 3.

improve protection against politically motivated dismissal, the tenure of judges has also been increased to seven years (rather than three years, as was previously the case). He noted that, as part of a “good governance” program,<sup>10</sup> the leaders in the court system are continuing to argue with the Government for longer tenure – life terms for members of the Constitutional and Supreme Courts; 15 years for judges in the lower courts.

Within USAID, one approach mentioned in USAID/CAR for mobilizing a future, comprehensive judicial reform program in Kyrgyzstan would be to place the management of a new project within the Office of Democracy and Governance, rather than in the Office of Economics and Finance. However, D&G office members at the exit briefing doubted whether this should be given priority as an element of the FY05 program, and the assessment team did not review the current or prospective activities of the D&G office that might be incorporated into such a broader project for court reform.

Continuation and maintenance of the Judicial Opinion Data Base. From discussions with Kyrgyz legal practitioners and Mr. Davletov, it seems clear that the JODB will survive and continue to be updated after August 2005 only if USAID offers continued financial and technical support. Because of the previous hiatus in the JODB for a couple of years until the posting of recent cases during the summer and fall of 2004, it will take some time for USAID to judge the number of ongoing users of the JODB and the value that it has for them in their work.

Toward this end, ARD/Checchi needs to collect more information from users during 2005 and to conduct analysis of the uses to determine where the main value of the JODB lies. If the finding is positive, USAID will have an improved prospect for having management of the JODB “migrate” to the Ministry of Justice in 2006, with confidence that the quality and usefulness of the data base will be maintained on a sustainable basis. The assessment team felt that, at present, the MOJ may not be sufficiently convinced of the JODB’s value to take full responsibility for ensuring its effective management.

As complementary measure, USAID should encourage the Government to incorporate into law a requirement that all judicial opinions be publicly available. For example, this could be specifically included within the law on public access to information that the World Bank and GOKR have negotiated as one of the benchmarks for tranche three of the GSAC program.

Training for judges, 2005-2006. Several contacts interviewed in Bishkek expressed strong support for more training of judges in Kyrgyzstan. Mr. Kenenbaev emphasized that much of the training needs to be by senior judges, explaining to lower court judges how to do their work.<sup>11</sup> Mr. Rafkat Huseynov of the Investor Roundtable commented

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<sup>10</sup> USAID/CAR staff note that an official Governance Reform Strategy was approved by President Akayev in June 2004. The Strategy itself says nothing about the judicial reform; however, the Consultative Council for good governance and its Secretariat have been working on amending several legislative acts that deal with the judiciary and courts -- in particular toward the increased responsibility of judges and toward the introduction of administrative courts.

<sup>11</sup> This recommended approach of using sitting senior judges as trainers is being implemented in the main training program for January-July 2005.

that it seems especially to be needed at the lower courts in rural areas. Ms. Natalya Galyanova, who chairs the Chamber of Tax Consultants, commented that many judges need much greater training on tax issues.<sup>12</sup>

At present, it appears that there are no Court System “core training courses” and no training requirement for judges in Kyrgyzstan. Nor are there any Court System requirements for testing or certification of knowledge and competency for judges. However, the “mass training” program through USAID’s two-week course program during January-July 2005 may provide a basis for future evolution of a required training regimen for judges in their core areas of competency. In particular, the ARD/Checchi COP felt that the willingness of Supreme Court Chairman Osmonov to carry out testing at the end of the two-week training course reflects his desire to inject more professional discipline within judicial ranks and to begin to create some objective measure of each judge's competence and performance.

After the planned training for judges in 2005 on the new Civil Procedures Code, Deputy Chairman Davletov stated that future priorities that USAID could help to organize for training commercial sector judges would be on financial issues – tax and customs, pledge, mortgage, and bankruptcy.

Requests for clarification under the USAID-Supreme Court MOU of judicial standards and procedures. To date, USAID has made no requests for clarification. The proposed approach is that the Supreme Court would issue such clarifications and that the USAID project would publish them – using the JODB and other venues -- for wide use by judges and the business community. If the MOU is extended through 2005/06, USAID should consider the need for requesting Court clarifications relating to

- appeals of sanctions against commercial banks by the National Bank and
- appeals against non-judicial foreclosure on real estate by creditors.

(i) After the “dust has settled” around the changes in bank regulatory laws enacted by the GOKR during 2004, USAID in 2005 or 2006 should request a clarification by the Supreme Court of the manner in which the courts treat appeals against regulatory enforcement against unsafe or unsound practices of commercial banks.

In recent years, as noted by several contacts, there have been many problems with judicial "activism" and misapplication of the law in cases where the National Bank is taking action against a private commercial bank through the exercise of its supervisory authority. In a typical case, the National Bank of Kyrgyz Republic, which has supervisory responsibility for commercial banks in order to protect bank depositors from risks of loss, has applied sanctions and/or revoked the banking licenses of certain banks that have violated risk-management norms and standards. Major shareholders of the banks have then sued the National Bank, have applied political and other influence on

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<sup>12</sup> As an illustration of such a need, the LIME project COP later noted that even the Supreme Court has incorrectly supported a State Tax Inspectorate interpretation of ‘capital investment’ under the Tax Code that treats as taxable income the funds transferred from an outside parent company to a local branch office to enable the branch office to conduct business.

the courts, and have obtained relief and orders for the National Bank to return the license to the bank.

To date, donors have taken two approaches to try to combat such misconduct by the courts that undermines the authority of the National Bank – a regulator that is regarded by the donors as a highly competent and ethical regulator. First, a BearingPoint legal expert on international practices of bank supervision and regulatory enforcement over commercial banks presented a two-day seminar for 30-40 judges, highlighting the general world practice that courts defer to the bank regulator's judgment on bank safety and licensing issues (except in countries such as Argentina and Turkey where colossal bank failures later ensued!). Informal feedback from the judges in the seminar, however, indicated that many did NOT feel that Kyrgyz judges, operating under Kyrgyz law, should necessarily defer to the National Bank.

Second, the IMF imposed during the spring of 2004 a number of 'bank-supervision' conditions for disbursement of balance-of-payments credit to Kyrgyzstan,<sup>13</sup> including

- Increased transparency (public availability) of National Bank enforcement actions and related judicial decisions regarding those actions (by June 2004);
- Submission to Parliament of draft amendments to the Civil Code and to six other existing codes or laws, to eliminate conflicts with banking legislation (by September 2004);
- Preparation for IMF staff comments of amendments to the Banking Law that would ensure legal protection of the National Bank and its staff against lawsuits for actions taken while acting in good faith and that would establish an internal dispute settlement mechanism (by September 2004); and
- Submission of amendments to the Code of Administrative Responsibility and banking law to increase monetary fines that may be levied against commercial bank officials by the National Bank (by September 2004).

Although many of the above legal changes have been submitted and/or enacted, ARD/Checchi lawyers are not optimistic that these changes will fully solve the problems of appropriate action by the courts on enforcement of bank regulatory sanctions. Thus, USAID and other donors will likely see a need in the future for drafting further legal amendments and/or requesting Supreme Court clarifications regarding criteria and procedures to be followed by the courts. Per the current or a new MOU with the Supreme Court, it will likely be useful for USAID to request such a clarification from the Court.

(ii) Assuming that the Law on Pledge and Mortgage will be enacted during 2005, there may be future cases where debtors will challenge in the courts the use of the trust mechanism for non-judicial foreclosure. Such challenges will cast a cloud over the reliability of that foreclosure mechanism and will undermine the safety and compromise the risk-reduction virtue of new mortgages. Thus, this may be another area where a

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<sup>13</sup> See Kyrgyz Republic: Fifth Review Under the Three-Year Arrangement Under the Poverty Reduction and Growth Facility—Staff Report; and Press Release on the Executive Board Consideration, July 2004, page 43.

request for clarification by the Supreme Court could restore or sustain the improved efficiency of the credit market that the new mortgage law was designed to deliver.

### **3. Building constituencies for a market economy**

Updating of legal guides for business? A lot of the work that has been done by the LIME project over the past four years in this area has been rendered obsolete by changes in laws. Thus, some of the materials on the project website might contain a warning that many of the resources, including the electronic litigation guide, the guide for notaries and the commentaries (both civil and tax), are now out of date or will be shortly.

While many of the publications, brochures, and legal data bases produced by LIME may have been important ways to improve business access to and understanding of the legal system, the assessment team did not attempt to explore how much use has been made of such publications, except in the area of tax law. In the tax area, the most important products and services for business seem to have been transferred to the Chamber of Tax Consultants and may not require ongoing assistance from USAID. USAID/CAR may wish to examine further the demand and priority for updated legal publications in other areas.

Training for businesspersons in legal and regulatory remedies. During 2004 the LIME project has given increased emphasis to more-intensive training of businesspersons and business advocates to become knowledgeable about the law and to use this knowledge to begin to lobby the government for remedies of regulatory actions that are improperly implemented and unfriendly toward business.

Interviews with three of the business people who participated in the LIME Project's in-depth training seminar from December 2003 through May 2004 indicated that such training has had a positive impact in mobilizing many businesses to fight regulatory abuses rather than to passively feed demands for petty corruption from government agencies. In light of these examples, the Chief of Party for the LIME Project has argued that more of that type of training is needed and that this should be an emphasis for a successor commercial law project. One goal of such training would be to make the local business community more proactive in asking for legislative and regulatory reform.

Toward the same end, one of the business sector activists, Mr. Emil Umateliev, who met with the assessment team, suggested that USAID should help to strengthen the role of selected business associations by providing them with in-house legal experts who can help the associations better formulate and implement a lobbying agenda. He mentioned that business associations, such as the small (16 individuals) Bishkek Business Club that he belongs to, can operate on fairly low costs. For example, they had organized two business forums in 2003 and 2004 that had been fully financed by sponsors and participants' fees. However, that club and even larger groups like the Congress of Business Associations (with its 22 member firms) lack resources to hire full-time legal experts to act as advocates for the members.

The assessment team felt that there was merit in providing future USAID assistance toward training of business leaders to lobby for legal and regulatory changes and toward providing in-house legal expertise to selected business associations. However, we were more inclined to see that support provided by other USAID projects (TFI, EDP, the Investor Roundtable) that also have that type of work within their scope – rather than by the successor to the LIME/commercial law successor project.

#### **4. Supporting market reforms**

##### **a. International Court of Arbitration**

The use in commercial contracts of arbitration clauses citing the Bishkek ICA seems to be ramping up quickly during the second half of 2004. Prospects for a rapid expansion of its activity during 2005 and 2006 also seem quite good. If it could advertise the successful resolution of cases that ICA arbitrators have handled, demand would undoubtedly grow even faster; however, confidentiality provisions on ICA cases do not make it possible to advertise specific cases.

The primary immediate need for USAID is to reevaluate the schedule for phasing out its support for office rent of ICA, which had been scheduled to drop from two-thirds to one-third in 2005.<sup>14</sup> Based on Mr. Kenenbaev's estimate of the additional time needed by ICA to reach self-sufficiency, the assessment team would recommend re-phasing USAID's support and extending such support for an additional year.

Given the poor performance of the existing court system for handling disputes and enforcement of valid contracts (see page 15, above), it would be a serious mistake for USAID to allow third-party arbitration through ICA Bishkek to collapse during 2005-06 because of a financial shortfall of fee income on the early disputes that are brought before ICA.

Apart from the operating expenses for its office, ICA Bishkek no longer seems to require other types of support from USAID -- so long as the Supreme Court continues to uphold enforcement of ICA awards. The latter proviso is important, however. If Kyrgyz judges show a future tendency toward overturning or preventing the enforcement of decisions of the ICA arbitrators, USAID and the successor commercial law project should be prepared to help correct that tendency through some of the measures now provided in the MOU between USAID and the Supreme Court.

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<sup>14</sup> As an interim relief measure, USAID/CAR has approved the continued funding of the ICA in the amount of two-thirds of the original budget until the end of the LIME contract in August 2005.

## b. Support for Procuracy

Within the state Procuracy, the prosecutors designated to deal with commercial affairs have demonstrated both a keen interest and some skill to act as a sort of ombudsman for business enterprises in their conflicts with GOK regulatory agencies. In Section C.4 above, we noted three cases where ARD/Checchi and the TFI project had joined forces with the Procuracy to provide effective support to the business-protection activities.

Mr. Kanat Amankulov, Head of the Law Implementation Supervision Department in the Office of the Prosecutor General, also described for the assessment team a number of other important business commercial cases that illustrate how the Procuracy seems to have taken the initiative to defend businesses' rights during recent years.

Duties on imports of pharmaceuticals. Under a regional free-trade agreement among several former Soviet countries, Kyrgyzstan and other participating countries agreed to eliminate import tariffs on pharmaceuticals produced within the region. However, Kyrgyz customs authorities continued to levy a 10 percent duty on imports of pharmaceuticals from Russia and Kazakhstan. When complaints to the Customs Committee and the Ministry of Finance were ignored, the local association of pharmaceutical importers requested assistance in September 2004 from the state prosecutors. The Procuracy issued a protest to the Customs Committee. As a result, Customs has agreed to provide duty-free treatment in the future and to make refunds for previous duties that had been improperly collected.

Use of reference prices for customs valuation of imports. As a member of the World Trade Organization, Kyrgyzstan is obliged to apply import tariffs against the value of the goods stated on the invoice. However, as in many ex-socialist states, Kyrgyz customs authorities continued to maintain a list of reference prices for imports and to apply a higher valuation for tax purposes when the invoice price was lower than the reference price. After three years of protest actions by the Procuracy, the Customs Committee agreed in 2004 that this practice must stop and directed customs agents to use the invoice price as a basis for valuation.

Taxes in Issy-kuhl. At the oblast level, Issy-kuhl introduced a number of illegal taxes on businesses. The Procuracy protested these taxes to the Local Administration. When the latter ignored the protest, in the interests of the State Commission for Business Development, the prosecutors themselves filed a suit with the Supreme Court. As a result, these taxes were abolished by the Supreme Court during 2004.

For USAID, two major advantages of promoting the Procuracy as a defender of business enterprises against regulatory abuses are

- With its budgetary funding from the government, the procuracy has good prospects for “sustainability” – as an institution that can survive on its own future financial resources (a prospect which is more doubtful in the case of most other advocates for entrepreneurs' rights – such as business associations);



- The size of the network of prosecutors to deal with commercial issues is substantial – 15 commercial-section prosecutors at the national level in the department of Law Implementation Supervision; five at each of the seven regional/oblast offices; and one or two at each “district-level” office.

Does the Procuracy need future assistance from USAID? In the opinion of USAID project implementers who have worked with the Procuracy during 2003-04, the prosecutors would benefit from future USAID/CAR assistance in several areas. At the LIME Project, David Greer felt that, as had been the case regarding the mayor’s campaign to set quotas for collection of fines in Osh, the prosecutors would often need the type of legal research that LIME provided in order to find a firm statutory basis for sustaining their protests against GOK agencies. He also suggested that it would be useful for USAID to provide the Procuracy offices with such items as subscriptions to the Toktom data base of Kyrgyz laws, provide books to establish a legal library, and to allow them to participate in USAID-sponsored training courses on rights of entrepreneurs. In a separate meeting, TFI’s Terence Slywka indicated that many offices of the Procuracy may have a need for computers and other equipment -- as indicated in the Osh region, where a member of the local prosecutor’s office expressed to TFI an interest in trying to salvage old keyboards or other equipment that the TFI project might be discarding.

When the assessment team met with Mr. Amunkulov, he indicated that the Procuracy would welcome future professional advice and support from USAID-funded experts (such as had been provided in Osh) but that “we are not asking for any direct resources.” On the other hand, he said that it would be very useful for the Procuracy to get help with publicity efforts – such as a newsletter, televised news conferences, etc. – so that entrepreneurs could become more familiar and gain confidence in the prosecutors as allies who can help them fight against administrative abuses. For example, he said, his office could provide “case studies” that illustrate how the Procuracy has helped various entrepreneurs and business groups to successfully challenge and reverse such abuses.

The assessment team strongly endorses the idea that USAID should give priority to future collaboration with the Procuracy and should be flexible in responding to requests that seem well targeted for the assistance of the business community, including assistance from the LIME-successor project. However, within its scope of work, it seems that TFI (rather than a successor to the LIME project) could readily assume more leadership as the USAID provider of assistance in that area. However, to be effective, TFI may need to expand the number of legal experts and the range of skills (e.g., documentary film production) of its Kyrgyz staff in order to meet the needs of, and sustain the confidence of, the prosecutors.

## **LIST OF ANNEXES**

**Annex 1. List of Contacts Interviewed**

**Annex 2. IRT Investment Matrix for 2004/05**

**Annex 3. Memorandum of Understanding Between USAID and the Supreme Court**

**Annex 4. Topics for Core Judicial Training**

**Annex 5. Doing Business, Snapshot of the Business Environment – Kyrgyz Republic (to be downloaded from the website:**

**<http://rru.worldbank.org/DoingBusiness/ExploreEconomies/BusinessClimateSnapshot.aspx?economyid=106> )**

## ANNEX 1: LIST OF CONTACTS INTERVIEWED

### November 2-3, 2004

Mark Urban	Commercial Law Advisor, USAID/CAR
Lewis Tatum	Economic Advisor, USAID/CAR

### November 4, 2004

Kelly Seibold	Chief of Party, Trade Facilitation and Investment (TFI) Project, Pragma
Stephanos Orestis	Country Manager, TFI Project/Regional, Pragma

### November 5, 2004

David Greer	Deputy Director, LIME Project/Kyrgyzstan, ARD/Checchi
Munavara Paltasheva	Almaty Association of Entrepreneurs

### November 8, 2004

Terence Slywka	Country Manager, TFI Project/Kyrgyzstan, Pragma
Olga Kolasova	Attorney, TFI Project/Kyrgyzstan, Pragma
Brian Kemple	Chief of Party, LIME Project/Kyrgyzstan, ARD/Checchi
David Greer	ARD/Checchi

### November 9, 2004

Irina Krapivina	Activity Manager, LIME Project/Kyrgyzstan, USAID/Bishkek
Eamon Doran	Private Sector Advisor, USAID/Bishkek
Michael Merit	IMF Country Representative for Kyrgyz Republic
Isaac Svartsman	IMF Advisor, National Bank of Kyrgyz Republic
Roland Clarke	Senior Public Sector Specialist, World Bank
Serdar Yilmaz	World Bank
Natalia Pisareva	Economist, World Bank, Bishkek
Rafkat Hasanov	Executive Administrator, Investment Round Table

### November 10, 2004

Natalya S. Gallyamova	Partner, Veritas law firm, and Vice Chairman, International Court of Arbitration, Bishkek
Irina Gorshkova	President, Business Club
Gennady N. Karabanov	Vice President, Business Club

November 10, 2004

David Grant  
Talgat Chinetov

Director, International Business Council  
Director, BiForce Trading Company

November 11, 2004

Temirbek Kenenbaev  
Emil Umetaliyev

Chairman, International Court of Arbitration, Bishkek  
Chairman, Congress of Business Associations  
(and former chair of Bishkek Business Club)

Kanat Amunkulov

Head of the Law Implementation Supervision Department,  
Office of the Prosecutor General, Ministry of Justice

Aybek Davletov

First Deputy Chairman, Supreme Court of the Kyrgyz  
Republic



Adopted by

Decree of the President  
of the Kyrgyz Republic  
dated October 7, 2004  
? 331

**ANNEX 2:**

INVESTMENT MATRIX  
(September 2004 – August 2005)

*Encouraging Investment in the Private Sector and Economic Growth through Good Governance*

The Investment Matrix is based upon the following key principles and rules:

- The basic purpose of the Investment Matrix is to encourage investment in the private sector of the Kyrgyz Republic and economic growth through good governance. The Matrix is divided into the following main categories:

- 1) Deregulating the economy;**
- 2) Tax policy and tax administration to stimulate investment;**
- 3) Creating a legal foundation that stimulates investment;**
- 4) Investment Marketing.**

- Assignments provided in this matrix are top priority within the framework of the National Strategy for Reduction of Poverty (NSRP) and the Comprehensive Development Framework of the Kyrgyz Republic (CDF) with regard to stimulating investment in the private sector;
- Assignments are based upon the Resolution of Investment Summit IV. These assignments take into consideration results of work completed by Working Commissions, Working Groups, experience accumulated during realization of measures to encourage investment, recommendations of the Government, Deputies of the Jogorku Kenesh of the Kyrgyz Republic, the private sector and experts of international donor organizations;
- Assignments are to be carried out by Working Commissions, Working Groups and Experts Groups comprised of representatives of the private sector and government organs, Deputies of the Jogorku Kenesh and representatives of international donor organizations. Working Commissions, Working Groups and Experts Groups are to have stable compositions and work regimes (monthly meetings of Working Commissions and Working Groups and weekly meetings of Expert Groups that prepare recommendations for discussion of the Working Commissions and Working Groups). Before a draft of any normative act is to be submitted to the Government, it must be discussed by the Working Commission or the Working Group with the International Business Council and corresponding remarks are to be prepared;
- For purposes of securing compliance of adopted laws and regulations to the fundamental provisions of the new investment policy of the Kyrgyz Republic, drafts of any regulation or law having a direct or indirect relationship to assignments being carried out within the framework of the Investment Matrix must be submitted preliminarily for review to the relevant Working Commission or Working Group. Without the expert comments of such Working Commission or Working Group the draft regulation or law cannot be submitted for consideration of the President or Government of the Kyrgyz Republic.
- For each assignment of the Investment Matrix, the chairperson of the Working Commission or the Working Group and the Secretariat of the Consultative Council on Foreign Investments of the Kyrgyz Republic (“Secretariat”) jointly must prepare concepts for realization of the matrix point that must show:
  - The purpose of the assignment with a clear indication of the specific final result;
  - A short description of the problem preventing attraction of investment;

- Specific measures needed to implement the assignment with an indication of who is responsible to perform them;
  - Sources of needed financing to implement the assignments;
  - A detailed calendar plan to implement the assignment of the Investment Matrix.
- 
- The Government of the Kyrgyz Republic is to manage implementation of the Investment Matrix;
  - The Prime Minister is responsible to supervise implementation of the Investment Matrix;
  - The Secretariat is to monitor implementation of the Investment Matrix for the purpose of keeping the Consultative Council on Foreign Investments informed;
  - The Consultative Council on Foreign Investments provides its evaluation of work performed on the assignments in the Investment Matrix.



?	Assignment	Due Date	Responsibility for implementation	
	1. DEREGULATING THE ECON			
1. Implementing the Concepts for Deregulating the Economy				
1.1 Activities to prepare, adopt and apply laws and regulations regulating business activity				
1.1.1	Secure implementation of the Law of the KR “On Making Changes and Amendments into the Law of the KR “On Normative Legal Acts of the KR” dated July 17, 2004 ? 89:  a) Introduce appropriate amendments to the Process Rule (“Reglament”) of the Government of KR; b) Establish a subdivision of the Administration of the President in accordance with point 5.1 of the Resolution of Investment Summit IV; c) Prepare a program to introduce regulatory impact analysis (RIA), including instructional training for government agencies and the private sector per points 4 and 5 of the Resolution of Investment Summit IV; d) Introduce amendments to the Process Rules (Reglements) of oblast government administrations and the cities of Bishkek and Osh using the experience of the state administration of the Osh oblast.	31 Dec.04	Working Commission on Deregulating the Economy, Administration of the President, Apparat of Prime Minister Oblast level state administrations, Mayors’ offices in Bishkek and Osh	Ch the De KI  De KI  Ch “R sta
1.1.2	To provide stability and predictability of laws, draft a new version of the Law of the KR “On Normative legal acts of the KR” (and review the possibility of changing its status to that of a constitutional law) to create a “hierarchy of laws”, defining “core” laws and the relationship between such “core” laws and other laws.	30 June 05	Working Commission on Deregulating the Economy, Representatives of the Jogorku Kenesh and judicial system (with their agreement)	Di
1.2 Activities to simplify government registration, re-registration and liquidation of business entities				

<sup>15</sup> The list of donors and private sector participants may change or be increased by the Secretariat for the Consultative Council on Foreign Investments

1.2.1	To enable establishment of a “one stop shop” system, draft amendments to the Reglament requiring cooperation and the exchange of information between government agencies involved with registration, re-registration and liquidation of legal entities; also bring laws and regulations into compliance with the Law of the KR “On State Registration of Legal Entities”.	31 Dec.04	Working Commission On Deregulating the Economy Ministry of Justice, National Statistics Committee; Revenue Committee under the Ministry of Finance, Social Fund, National Bank	Re of
1.2.2	Draft changes and additions to the Law of the KR “On State Registration of Legal Entities” per recommendations contained in the Analytical Report prepared by the Working Commission on Deregulating the Economy for Investment Summit IV; also make relevant changes and additions in the Laws of the KR “On Joint Stock Companies”, “On Business Partnerships and Companies”.	31 Dec.04	Working Commission on Deregulating the Economy Ministry of Justice, National Statistics Committee, Revenue Committee under the Ministry of Finance, Social Fund, National Bank	Di
<b>1.3 Activities concerning legal regulation of land and urban development issues, along with government</b>				
1.3.1	Prepare and submit to the President a draft order of the President of the KR to establish a Working Commission on Regulating the Real Estate Market made up of representatives from government agencies, international donor organizations, the private sector and deputies of the JK, in accordance with Resolution of Investment Summit IV.	30 Sept.04	Administration of the President, Vice Prime Minister for Economic Development, Trade and Investments	O K
1.3.2	Ensure passage through the Jogorku Kenesh of the draft law of the Kyrgyz Republic “On Making Changes and Amendments to the Law of the Kyrgyz Republic ‘On Government Registration of Rights to Immovable Property and Related Transactions’” drafted in accordance with instructions of the Consultative Council for Foreign Investments, and bring the	31 Dec.04	Working Commission on Regulating the Real Estate Market, Administration of the President, Ministry of Justice, GosRegister	A

	Law of the Kyrgyz Republic “On Realtors’ Activity” into compliance with the draft law eliminating restricted access of participants of real estate market to information about real estate and its owners.			
1.3.3	Introduce within the Kyrgyz Republic standards for professional activity regarding the appraisal of land and immovable property based upon standards prepared by the International Committee on Standards for Property Appraisal.	30 June 05	<b>Council on Development of Appraisal Activity under</b> State Committee on State Property Management	R ol a
1.3.4	<p><b><u>Ensure the introduction of zoning:</u></b></p> <p><b><u>a) Provide for the introduction of changes in the Land Code of the Kyrgyz Republic that improve the foundation for zoning based on experience from existing pilot cities;</u></b></p> <p>b) Provide for implementation of normative legal acts on zoning in ten pilot cities about:</p> <ul style="list-style-type: none"> <li>Improving procedures for assigning land (for payment) to owners of buildings located on land as indicated in the Model Regulations and Conditions for Paid Assignments into Ownership or for Lease of Land Parcels located within Population Centers, adopted by Resolution of the Government No. 57 dated 5 February 2004;</li> <li>Delivery to applicants “a Plan for the Land Parcel” that guarantees an owner’s rights to multiple uses of the parcel, including types and rules concerning permitted uses.</li> </ul> <p>c) Prepare proposals about introducing zoning in the city of Bishkek and for other cities of the Kyrgyz Republic.</p>	<p>31 Dec.04</p> <p>30 June 05</p> <p>30 June 05</p>	<p>Working Commission on Regulating the Real Estate Market, Gosregister, GosKomArchStroi</p> <p>Working Commission on Regulating the Real Estate Market, Gosregister, GosKomArchStroi</p> <p>Working Commission on Regulating the Real Estate Market Local Keneshes of the cities (by agreement) Mayors’ offices of Bishkek and other cities</p>	<p>D m ar C</p> <p>- ol pl la pe - us sq w ar ac - ci th B</p> <p>A th B</p>
1.3.5	Draft a law to introduce changes in the Land	31 Dec 04	Working Commission on	D

	Code of the KR to stimulate foreign investors to invest in land and immovable property along with local companies that own land and immovable property		Regulating the Real Estate Market, Ministry of Economic Development, Industry and Trade	R In A
1.3.6	Minimize transaction costs during investment in land and immovable property: <ul style="list-style-type: none"> <li>a) Analyze the justification for various demands and conditions imposed by government management organs and other organizations upon builders during the investment/construction process;</li> <li>b) Analyze existing payments and allocations made by builders for services provided by government management organs and other organizations for the issuance of permit documents during the investment/construction process;</li> <li>c) Prepare approaches to define the amounts of payments and allocations to be made by builders for services of various organizations and for the issuance of permits needed during investment/construction processes and provide for their introduction;</li> <li>d) Introduce changes and additions to laws and regulations that affect technical “passportization” of immovable property.</li> </ul>	31 Mar 05  31 Mar 05  30 June 05  31 Mar 05	Working Commission on Regulating the Real Estate Market, Ministry of Economic Development, Industry and Trade, GosRegister, GosKomArchStroi	A  A  D  D In th G of Pr T D
1.3.7	Ensure implementation of the Law “On Interpretation of Point 7 of Article 6 of the Law ‘On Putting into Force the Land Code of the KR’” signed into law by the President of the KR on August 13, 2004, No.122.	31 Dec.04	Working Commission on Regulating the Real Estate Market, GosRegister, State Committee on State Property Management, GosKomArchStroi	R G “ pa pr oi cc in be
1.3.8	Prepare a draft Code of the Kyrgyz Republic “On Urban Planning, Architecture and	30 June 05	<b>Working Commission on Regulating the Real Estate</b>	D



<b>1.6. Activities to reform the system of mandatory payments made by businesses to conduct business</b>				
1.6.1	Implement the Program for reforming the mandatory payments system for businesses adopted by the Decree of the President of the KR dated June 14, 2004, ? 202.	30 June 05	Working Commission on Deregulating the Economy; Apparat of Prime Minister, Ministry of Economic Development, Industry and Trade, Ministry of Finance	Th pra wit the Ma for
<b>1.7 Formation of the legal basis for self-regulating organizations</b>				
1.7.1	Make proposals to create legal and organizational basis for self-regulating organizations.	31 Dec. 04	Working Commission on Deregulating the Economy	An
<b>2. TAX POLICY AND TAX ADMINISTRATION TO STIMULAT</b>				
2.1	<b>Develop and introduce procedures for tax administration aimed at decreasing investors' costs and liberalizing the regime for tax inspections to reduce their numbers in accordance with the Resolution of the Investment Summit IV.</b>	31 Dec. 04	Commission for Preparation of a New Version of the Tax Code, Revenue Committee under the Ministry of Finance; Ministry of Finance	Ne
2.2	Develop a system to ensure enforcement of tax obligations in accordance with the Resolution of Investment Summit IV.	30 June 05	Revenue Committee under the Ministry of Finance, Ministry of Finance	Ins do Co
2.3	Improve taxation of Small and Medium Enterprises in accordance with the Resolution of Investment Summit IV.	31 Dec. 04	Commission for Preparation of a New Version of the Tax Code Revenue Committee under the Ministry of Finance; Ministry of Finance	Ne
2.4	Develop investment incentives in accordance with the Resolution of Investment Summit IV.	31 Dec. 04	Commission for Preparation of a New Version of the Tax Code Revenue Committee under the Ministry of Finance, Ministry of Finance	Ne

3. CREATING A LEGAL FOUNDATION THAT STIMULATES				
3.1	Continue the shepherding of draft laws developed under prior Investment matrices through the Jogorku Kenesh, including: - Law “On Pledge”; - Draft laws shown in Point 3.3 of Investment Matrix II; - Law “On amendments and additions to the laws of the KR” (“On Banks and Banking Activities”, “On Auditing Activity”).	Constantly	<i>Ministries and agencies, Ministry of Justice, Apparat of Prime Minister</i>	Ad the
3.2	Continue work initiated in prior investment matrixes to: a) Carry out activities to identify and cancel legal acts adopted by ministries, agencies, other state bodies and also national, oblast and city level administrations that contradict Laws affecting business activity. b) Prepare a draft law on making changes and amendments to the Code of Administrative Responsibility, providing the right of heads of oblast justice departments to impose administrative sanctions for administrative violations pursuant to articles 400 - 400-1, 401 – 403 of the Administrative Responsibility Code. c) In accordance with item 4 of this Decree of the President, the Ministry of Justice shall impose administrative sanctions on government officials for: - violation or failure to implement requirements of laws, decrees of the President, Government resolutions and resolutions of the Jogorku Kenesh concerning protection of investment and other business activity; - interference of government officials into the activity of privately owned organizations in the form of illegal demands, including the creation of fees and charges not provided in Laws; - failure to submit for government registration (as required by laws of the KR), the normative legal acts of ministries and administrative agencies that have a general, mandatory character.	30 June 05  31 Dec. 04  Constantly	Office of the General Procuracy; Ministry of Justice Ministry of Economic Development, Industry and Trade  <i>Ministry of Justice</i>   Ministry of Justice, Office of the General Procuracy	Ad me res no  Ad Re of  Re ap Co Re
3.3	Continue review of the authorities of ministries and agencies (not less than 4 more) for compliance with Article 19 of the Constitution of the KR.	01 Feb. 05  01 June 05	<i>Office of the General Procuracy, Apparat of Prime Minister,</i>	Su ref  Su

			<i>Ministry of Justice</i>	
			<i>Ministry of Economic Development, Industry and Trade</i>	
3.4	Continue work to create the system to disseminate court decisions of all instances concerning economic disputes and ensure access to it electronically.	30 March 05	<i>Administration of the President, Supreme Court (upon agreement)</i>	Cr dis dec ecc
<b>4. INVESTMENT MARKETING</b>				
<b>4. Ensure implementing the external marketing strategy:</b>				
4.1	Form a working group to conduct organizational activities and to prepare justifications for establishment of an Investment Promotion Agency which functions as a quasi-governmental body having both private and state characteristics. Its Board of Directors should include representatives from relevant ministries, international donor organizations and the business community.	15 Oct. 04	Vice Prime Minister for economic development, trade and investments, Ministry of Economic Development, Industry and Trade with participation of other ministries and agencies	O K
	?) Submit justifications for creation of an Investment Promotion Agency for review by the donor community and conduct relevant negotiations.	01 Dec 04	Working group for Creating an Investment Promotion Agency; Ministry of Finance	C ac
	b) In light of undertaken negotiations, prepare a draft Presidential Decree, draft Bylaws for the Agency and other justifying materials. Provide the Agency with appropriate powers to ensure its effective work particularly with regard to authorities to work jointly with state agencies to eliminate barriers to investments. Ensure a coordinated approach and elimination of duplication in the work of state agencies in the area of FDI promotion, concentrating saved resources in the Agency.	30 June 05	Working group for Creating an Investment Promotion Agency	



4.2	Provide for implementation of the action plan in accordance with the external marketing strategy “Kyrgyzstan Goes Public”.	Constantly	Ministry of Economic Development, Industry and Trade; Ministries and agencies; Oblast state administrations	C ai
4.3	Implement a set of measures to promote FDI in the regions including implementation of the regional programs on promotion of investment.	Constantly	Ministry of Economic Development, Industry and Trade; Ministries and agencies; Oblast state administrations	In pr E

**ANNEX 3. MEMORANDUM OF UNDERSTANDING**  
**BETWEEN**  
**THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT**  
**AND**  
**THE SUPREME COURT OF THE KYRGYZ REPUBLIC**

**1. INTRODUCTION**

The United States Agency for International Development ("USAID"), and the Supreme Court of the Kyrgyz Republic (the "Supreme Court") (together the "Parties"), agree to collaborate in (i) developing the database of judicial opinions; (ii) developing and implementing a suitable training program for the Kyrgyz judiciary; (iii) selecting issues for official clarifications by the Supreme Court; and (iv) providing mutually acceptable technical assistance to modernize selected courts. To achieve these goals and in the spirit of bilateral cooperation, the Parties have entered into this Memorandum of Understanding ("MOU") as a means of documenting each of the Parties intentions and expectations.

**2. USAID RESPONSIBILITIES**

USAID will provide technical assistance through its Legal Infrastructure for a Market Economy Project ("Project"), implemented under contract by the ARD/Checchi Joint Venture, ("Project Partner"). USAID, through the Project Partner, will:

- 2.1 Gather, store and manage (at its expense) up to 40,000 pages of the text per year of judicial opinions referenced in paragraph 3.1 below for inclusion in the existing judicial opinion database ("JODB") created by the Project and the former Highest Commercial Court of the Kyrgyz Republic.
- 2.2 Provide copies of the JODB to the courts of the Kyrgyz Republic free of charge, make the JODB available on the Internet and make copies on CD-ROM available to the public on a regular basis.
- 2.3 Make the JODB available to the Supreme Court for inclusion in the Court Information and Management System that is currently being developed for the Supreme Court and local courts with funding provided by the World Bank.
- 2.4 Collaborate with the Supreme Court to develop and carry out a mutually acceptable judicial training program ("Training Program"), including the preparation and production of written training materials and lectures, that is consistent with the

principles and requirements set out in Attachment 1 to this MOU. Specifically, USAID, through its Project Partner, will determine the subjects and lecturers (drawn from a pool of highly qualified judges, practicing lawyers, and other experts) for one-half of the total number of training hours of the Training Program.

- 2.5 Publish in the JODB and, additionally, in a form and scope mutually agreeable to the Parties, the Supreme Court's clarifications that are issued after the signing of this MOU.**

### **3. SUPREME COURT RESPONSIBILITIES**

The Supreme Court will:

- 3.1 Provide the Project Partner with copies (electronic, if possible) of judicial opinions in force issued by the Supreme Court and the local courts on commercial cases, civil cases, including commercial law (arbitrazh) cases, administrative cases and criminal cases (not to include, however, special proceedings or cases involving military personnel, family relations, minors, sexual offenses or State secrets). The Supreme Court will ensure that the Project receives the volume of texts of opinions set forth in paragraph 2.1 above.**
- 3.2 Seek financing for and use best efforts to ensure the continuation after the Term of this MOU of the JODB or a similar database that includes a substantial portion of the judicial opinions of the courts of the Kyrgyz Republic and makes them widely and easily available to the public.**
- 3.3 Collaborate with USAID and the Project Partner to develop and carry out the Training Program that is consistent with the principles and requirements set out in Attachment 1 to this MOU. Specifically, the Supreme Court will determine the subjects and lecturers for one-half of the total number of training hours of the Training Program and will determine the judiciary members to be trained at each training activity of the Training Program and ensure their attendance.**
- 3.4 Collaborate with USAID and the Project Partner to publish official clarifications of the Supreme Court in the JODB and, additionally, in a form and scope mutually agreeable to the Parties.**

### **4. JOINT RESPONSIBILITIES**

The Parties will jointly:

- 4.1 Develop and implement procedures consistent with Attachment 2 to the MOU to provide the Project Partner with copies of the texts of the judicial opinions referenced in paragraph 3.1 above.
- 4.2 Ensure the inclusion in the JODB of all the judicial opinions (subject to the exclusions referenced in paragraph 3.1 above) issued by the courts of the Kyrgyz Republic, to the extent that financial resources permit.
- 4.3 Develop and carry out a Training Program in accordance with the principles and requirements that are set forth in Attachment 1 to this MOU.
- 4.4 Agree on the form and scope of clarifications to be published by the Supreme Court.
- 4.5 Develop a mutually acceptable proposal regarding material and technical assistance to be provided to selected courts of the Kyrgyz Republic.**
- 4.6 Explore the prospects for further cooperation in developing and implementing case and court management software for the Supreme Court and local courts of the Kyrgyz Republic along the lines of the work carried out by the Project and the courts previously.**

## **5. GENERAL PROVISIONS**

- 5.1 Term. From date of signing through August 4, 2005.
- 5.2 No Obligation of Funds. Nothing in this MOU shall be construed as an obligation or commitment of United States Government funds. All USAID responsibilities shall be carried out under separate agreement with USAID implementing partners.
- 5.3 Availability of Funds. All USAID responsibilities under this MOU are subject to: (i) the availability of funds; and (ii) agreements between USAID and its implementing partners regarding the provision of assistance under this MOU.
- 5.4 Relation to Framework Bilateral Agreement. Assistance furnished by USAID under this MOU is United States assistance within the scope of the Agreement Between the Government of the United States of America and the Government of the Kyrgyz Republic Regarding Cooperation to Facilitate the Provision of Assistance, dated May 19, 1993, and is subject to the terms and conditions of that agreement, including specifically Article 1 which states that

*Commodities, supplies or other property provided or utilized in connection with United States assistance programs may be imported into, exported from, or used in the Kyrgyz Republic free from any tariffs, dues, customs duties, import taxes, and other*

***similar taxes or charges imposed by the Kyrgyz Republic, or any subdivision thereof..***

- 5.5 Compliance with United States Law and Regulations. USAID shall obligate, commit and expend funds and carry out operations pursuant to this MOU only in accordance with the applicable laws and regulations of the United States.
- 5.6 Title to and Use of Property. Unless otherwise directed by USAID, title to all property furnished by USAID shall remain in the name of USAID and shall be used only at locations approved by USAID. Upon completion of the assistance, title to the property furnished by USAID will be assigned to the Supreme Court of the Kyrgyz Republic and shall continue to be used exclusively for the assistance purposes described above. If property furnished by USAID and titled to the Supreme Court of the Kyrgyz Republic is used for purposes other than those agreed upon by the Parties, under circumstances which could reasonably have been prevented by appropriate action of the Supreme Court of the Kyrgyz Republic, then the Supreme Court of the Kyrgyz Republic shall, upon USAID's request, return such property or refund the amount disbursed for such property in United States dollars.
- 5.7 Exchange Rate. If funds are introduced into the Kyrgyz Republic by USAID or any public or private agency for purposes of carrying out obligations of USAID hereunder, the Supreme Court of the Kyrgyz Republic will make such arrangements as may be necessary so that such funds shall be convertible into currency of the Kyrgyz Republic at the highest rate which, at the time the conversion is made, is not unlawful in the country.
- 5.8 Publicity. The Supreme Court of the Kyrgyz Republic will give appropriate publicity to the assistance as a program to which the Government of the United States has contributed.
- 5.9 Authorized Representatives. The Parties shall be represented by those holding or acting in the offices held by the signatories to this MOU. Each Party may, by written notice, to the other, identify additional representatives authorized to represent that Party for all purposes other than executing formal amendments to this MOU.
- 5.10 Amendment and Modification. This MOU may be amended or modified by written agreement by the Authorized Representative of each of the Parties.
- 5.11 Suspension and Termination. Either Party may suspend or terminate, in whole or in part, the provision of assistance under this MOU, effective immediately upon notice to the other Party, if one Party determines in good faith that
- a. the other Party failed to comply with the provisions of this MOU;

- b. facts have arisen which make the achievement of purposes of this MOU improbable;
- c. the Parties will not be able to comply with provisions of this MOU;
- d. the provision of assistance under this MOU will result in violation of U.S. law or regulations or Kyrgyz law; or
- e. funding for the assistance is unavailable.

In the event of partial suspension or termination, such notice shall specify affected activities.

5.12 Nonwaiver of Remedies. No delay in exercising any right or remedy accruing to a Party in connection with this MOU will be construed as a waiver of such right or remedy.

5.13 Language. This MOU has been prepared in English and Russian. In the event of ambiguity or conflict between the versions, the English language version will control.

5.14 Effective Date. This MOU shall be effective when signed by both Parties.

Signed in Bishkek, Kyrgyzstan on the \_\_\_\_ day of \_\_\_\_\_, 2004 in four originals, two each in English and Russian.

**UNITED STATES AGENCY FOR  
INTERNATIONAL DEVELOPMENT**

**SUPREME COURT OF THE  
KYRGYZ REPUBLIC**

BY: \_\_\_\_\_

BY: \_\_\_\_\_

NAME : [insert]

NAME: [insert]

TITLE: [insert]

TITLE: Chairman, Supreme Court of the  
Kyrgyz Republic

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_

## **ANNEX 4. Topics for Core Judicial Training, January-July 2005**

### **Topics Proposed by the Project (USAID) that Have Been Included in the Current Seminar Plan**

#### *Civil Law*

1. Changes in the Civil Code of the Kyrgyz Republic. Areas of Civil Law Giving Rise to Disputes. (Civil Code, Civil Procedure Code)
2. Shipping Contracts. Judicial practice overview. Comments.
3. Cession of chose in action and novation.
4. Inheritance Law.
5. Judicial Practice in Marriage and Family Legislation.
6. Protection of honor, dignity, and business reputation. Compensation for moral damages.

#### *Land Law*

7. Resolving Disputes in Land Law: An Overview of Judicial Practice.
8. Ownership Rights in Land.
9. Respective Powers of the National Government and Local Self-Government in Land Market Regulation

#### *International Law*

10. Applying Private International Law to Civil Law Relations.

#### *Tax Law*

11. Problems in Implementing Tax Legislation.
12. Pretrial review of tax disputes.

#### *Criminal Law*

13. Gaps and Controversial Norms in the Criminal and Criminal Procedural Codes of the Kyrgyz Republic and How to Address Them.
14. Judicial Practice in Criminal Procedure. Problematic Aspects. Overview.
15. The Law of Obligation. Distinguishing Fraud from Civil Law Disputes Involving Default
16. Overview of Judicial Practice in Economic Crimes. Crimes against Property and Malfeasance in office.
17. Judicial Practice in Cases Involving Drug Trafficking.
18. Classifications of Crimes. Repeat Offenses and Sentencing.

*Judicial Ethics*

19. Code of Judicial Ethics.

*Other Topics*

20. Ombudsman of the Kyrgyz Republic: Legal Forms and Methods of Human Rights Protection.

**Topics Proposed by the Supreme Court that Have Been Included  
in the Current Seminar Plan**

1. Principles of Constitutional Jurisprudence
2. Applying International Legal Principles in National Legislation
3. Enforcing judgments of international courts
4. Recent Changes to the Civil Procedure Code
5. Challenging in Court Actions by State Agencies
6. Hearing Cases Brought by the Procuracy in the Interest of Physical and Legal Persons
7. Aspects of Bank Conservation and Liquidation
8. Judicial Practice in Tax Disputes
9. Liability for Failure to Meet Financial Obligations
10. Procedures in Customs Cases
11. Acquittal in Criminal Cases; Suspending Sentence
12. Judicial Practice in Cases Alleging Violations by State Officials
13. Sentencing. Making Sentencing More Humane
14. Analyzing and Weighing Evidence
15. Aspects of Criminal Prosecution of Minors
16. Dealing with Civil Complaints in a Criminal Proceeding
17. Criminal Liability. The Law Surrounding Accessories to Crimes.